SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 29 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,
Appellants,

v.

JAMES E. ALLEN, JR.,
as Commissioner of Education of the State of New York,
Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,
Intervenor-Appellees.

Appeal from the Court of Appeals of the State of New York

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., *AMICUS CURIAE*

ETHAN A. HITCHCOCK
1 Rockefeller Plaza
New York, N. Y. 10020

WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & BROOKFIELD
1 Rockefeller Plaza
New York, N. Y. 10020

I. N. P. STOKES
MAXIMILIAN W. KEMPNER
Of Counsel

TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT:	
POINT I—	
Private education is a constitutional right.	5
POINT II—	
Education in private as well as in public schools has a public purpose, directly affecting the public welfare, and is a proper subject for expenditure of state funds.	8
POINT III—	
The First Amendment does not forbid aid to education for a secular purpose where the primary effect is neither to advance nor to inhibit religion.	12
POINT IV—	
Schempp provides the applicable rule.	16
CONCLUSION	18

Table of Authorities

CASES: PAGE

Abington School District v. *Schempp*, 374 U.S. 203 (1963) ..... *Passim*

Bradfield v. *Roberts*, 175 U.S. 291 (1899) 17

Cochran v. *Louisiana State Board of Education*, 281 U.S. 370 (1930) 9

Engel v. *Vitale*, 370 U.S. 421 (1962) 17

Everson v. *Board of Education*, 320 U.S. 1 (1947) 4, 8, 9, 12, 13, 16

McCollum v. *Board of Education*, 333 U.S. 203 (1948) 16, 17

Meyer v. *Nebraska*, 262 U.S. 396 (1923) 6

Pierce v. *Society of Sisters*, 268 U.S. 510 (1924) 5, 7

Quick Bear v. *Leupp*, 210 U.S. 50 (1908) 16

State v. *Williams*, 253 N.C. 337, 117 S.E. 2d 443 (1960) 5

Zorach v. *Clauson*, 343 U.S. 306 (1952) 17

OTHER AUTHORITIES:

Constitution:

U.S. CONST. amend. I 4, 12

Statutes:

PAGE

Elementary and Secondary Education Act of 1965, 79 Stat. 29, 20 U.S.C. §236-44 10

Burns Indiana Stat. Ann. 1933, §28-512 (1948) 11

Kansas Stat. Ann. §72-4107 (1964) 11

La. Rev. Stat. Tit. 17, §351 (1963) 11

Miss. Code Ann. 1992, Tit. 24 §6656 (1952) 11

New York Education Law §2.12 (McKinney 1953) 15

New York Education Law §701.3 (McKinney 1967) 15

New York Laws of 1965, ch. 320, §1 14

General Laws of Rhode Island, 1956 §16-23-2 (Supp. 1965) 11

W. Va. Code Ann. §18-5-216 (1966) 11

Miscellaneous:

C. Blum, EDUCATION: FREEDOM AND COMPETITION, (1967) 7

Brief of American Jewish Committee *et al.* as *amici curiae* 14, 16

Certificate of Clerk, New York State Assembly, March 25, 1968 11

Certificate of Secretary, New York State Senate, March 19, 1968 11

A. Hacker, N.Y. Times, Magazine, October 1, 1967 6

PAGE

H. Howe, Address to the National Association of Independent Schools, March 4, 1967, in THE INDEPENDENT SCHOOL BULLETIN, May, 1967 11

National Association of Independent Schools, By-Laws, Art. II 1, 2

T. Sizer, Address to the National Association of Independent Schools, March 4, 1967, in THE INDEPENDENT SCHOOL BULLETIN, May, 1967 10

STATISTICAL ABSTRACT OF THE UNITED STATES, 1967 6

IN THE

Supreme Court of the United States

October Term, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

v.

JAMES E. ALLEN, JR.,
as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

Appeal from the Court of Appeals of the State of New York

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., *AMICUS CURIAE*

Interest of the *Amicus*

This brief is submitted with the consent of counsel for the parties in behalf of the National Association of Inde-

pendent Schools, Inc. ("the Association"), a Massachusetts corporation.

The Association's membership comprises approximately 690 independent schools engaged in primary and secondary education in 42 states of the United States. Its membership also includes 23 regional school associations and 14 other associations of teachers, alumni and scholarship groups connected with independent schools. One hundred and nine independent schools in the State of New York are Association members.

The stated purposes of the Association are

> "to assist, strengthen, and promote the interests of independent schools of the United States * * * to aid them to serve effectively the free society from which they derive their independence." National Association of Independent Schools, Inc., By-Laws, Art. II.

Members of the Association include schools which in general terms may be categorized as either (a) having no direct relationship of any kind with a religious group but may include in their program some form of religious observance varying in nature and degree from school to school; or (b) closely related to or controlled by a religious group. The latter group would be in the minority.

The Association files this brief because it believes that the Constitution permits state aid to private education where the legislative purpose is secular and the primary effect is to carry out the legitimate state purpose of aiding education. Should this Court fail to establish such criteria firmly, and as the controlling doctrine in this case, the private school will be prevented from contributing its full potential to the free society from which it derives its independence.

Statement of the Case

Two school districts in the State of New York challenged the constitutionality of a statute enacted by the New York State Legislature in 1965, and amended in 1966, providing for State financing of the purchase of textbooks, to be loaned to children attending both public and private schools. The statute provides in essential part:

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities." N.Y. EDUCATION LAW §701.3 (McKinney 1967.)

The legislative purpose is stated in the first section of the statute, which reads in part as follows:

> "* * * It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state." New York Laws of 1965, ch. 320, §1.

The appellants herein brought suit in the Supreme Court of the State of New York, Albany County, asserting that

compliance with the statute would violate both the State and Federal Constitutions. The Supreme Court of the State of New York upheld their contentions. 51 Misc. 2d 297, 273 N.Y.S. 2d 239 (A. 29). The Appellate Division of the Supreme Court reversed, dismissing the complaint on grounds of lack of capacity to sue, but all five justices concurred in the view that the statute in question did not violate either the State or the Federal Constitution. 27 A.D. 2d 69, 276 N.Y.S. 2d 234 (A. 45). The Court of Appeals, by a vote of four to three, affirmed the judgment of the Appellate Division, and upheld the constitutionality of the statute under both the State and Federal Constitutions. 20 N.Y. 2d 109, 281 N.Y.S. 2d 799 (A. 63). It is constitutionality under the First Amendment to the Federal Constitution which is at issue here. That amendment provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. Amend. I.

Summary of Argument

The decision of the New York Court of Appeals should be affirmed. The Court may achieve this result either under the rule of *Everson* v. *Board of Education*, 330 U.S. 1 (1947), or under the rule enunciated in *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). But the Court's affirmance should firmly establish the right of individuals to choose private education for their children, and the right of states to further education for all children, so long as the legislative purpose, as in the case of the statute under consideration, is strictly secular, and the primary effect is advancement of secular education, rather than advancement or inhibition of religion.

POINT I

Private education is a constitutional right.

Mr. Justice Brennan, concurring in *Schempp* said: "parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated" 374 U.S. at 242. This principle had been firmly established in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1924), where the Court held a state law unconstitutional which required that, absent special circumstances, all children must attend public school, and said:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.

And the North Carolina Supreme Court recently emphasized the need to protect nonpublic school diversity:

> "Standardization and regimentation in the field of learning is contrary to the American concept of individual liberty. It will be difficult to over-estimate the contribution of private institutions of learning to the initiative, progress and individualism of our people." *State* v. *Williams,* 253 N.C. 337, 345-46, 117 S.E. 2d, 443, 450 (1960).

The United States Commissioner of Education, Harold Howe II, in an address to the Association on March 4, 1967 said:

> "You [independent schools] can experiment with new course offerings that would arouse strong resistance

> if put forward by the public schools. As an example, I think independent schools have taken a commendable step forward with their decision to introduce major programs of sex education.
>
> "Your independence, then, gives you the freedom to shape an educational experience which is often superior to that available in many public school systems." THE INDEPENDENT SCHOOL BULLETIN, May, 1967, 14, 15.

Thus private education stands today as a vital and constitutionally protected right.

The parents of approximately 6,000,000 children* in the United States are currently reaching for something more than the standardization recognized by the Courts and educators alike as inherent in many public school systems. In New York, of the 4,150,000 present kindergarten-through-high-school pupils, some 900,000 or about 20% are currently receiving their education in the private sector. A. Hacker, N. Y. Times Magazine, October 1, 1967, p. 29.

Appellants by implication, if not directly, have injected the nature of parochial school education as a reason which they would have the Court consider for invalidating the legislation at issue. This is of course unjustified. Given the unquestioned right to receive a private school education, established by this Court, it is left to each state only to determine what standards of secular educational achievement must be met by private schools to provide the equivalent of the otherwise required public school education. See *Meyer* v. *Nebraska*, 262 U.S. 396, 402 (1923). When that standard is met—the secular standard—the state has no concern as to the concomitant which may or may not be taught with it, whether it be religion or political ideologies, so long as it is not "manifestly inimical to the public wel-

---

* STATISTICAL ABSTRACT OF THE UNITED STATES, 1967, at 111.

fare." *Pierce* v. *Society of Sisters, supra,* at 534. Otherwise there would not be that meaningful private education, which the Constitution protects. It follows that the extent or manner of instruction of the protected concomitants to a secularly approved curriculum is of no relevance to the right to a private education. And particularly irrelevant is the degree of permeation which may be alleged to exist as to any concomitant. For if we are to fear, and attempt to protect against, a concomitant, we must recognize that there is some form of concomitant in every form of education, and that its effect or strength is not necessarily measured by the degree to which it is emphasized.

Fortunately, we do not, and have not, as a people, and under our Constitution, feared the expression of any religious, or other belief, and have allowed each to pursue his own as he sees fit, so long as he trespasses not on the rights of others. As Jerome Lefkowitz said in *The Jewish World* under the caption "Faith and Pluralism":

> "I do not object to Secularism, my upbringing inclines me to it in many ways. But, make no mistake about it, Secularism is not the neutral position—it is a definite commitment. It is just as much an 'ism' as any other 'ism'." Quoted in C. Blum, EDUCATION: FREEDOM AND COMPETITION, p. 22 (Argus—1967).

POINT II

Education in private as well as in public schools has a public purpose, directly affecting the public welfare, and is a proper subject for expenditure of state funds.

In answering the due process argument which was unsuccessfully urged to defeat private school busing in *Everson*, this Court said:

> "The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.
>
> "It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U.S. 487; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green* v. *Frazier*, 253 U.S. 233, 240. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment did not strip the states of their power to meet problems previously left for individual solution. *Davidson* v. *New Orleans*, 96 U.S. 97, 103-104; *Barbier* v. *Connolly*, 113 U.S. 27, 31-32; *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 157-158.
>
> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get

> a secular education serves no public purpose. *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370; Holmes, J., in *Interstate Ry.* v. *Massachusetts,* 207 U.S. 79, 87. See opinion of Cooley, J., in *Stuart* v. *School District No. 1 of Kalamazoo,* 30 Mich. 69 (1874.)" 330 U.S. at 6-7.

Treating the same issue in *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930), upholding the Louisiana law for providing textbooks to school children, both public and private, Chief Justice Hughes said:

> "Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." 281 U.S. at 375.

The use of public funds for education thus becomes not only a power, but a responsibility of the state. How a state exercises such a conceded power and responsibility is something with which this Court has not seen fit to interfere except in rare instances, and this is so for the above expressed reason that "a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states." *Everson* v. *Board of Education, supra,* at 6.

We emphasize this state public purpose aspect of the statute under consideration, not because appellants have urged the contrary in support of their position, but because we submit that the Establishment Clause, to be considered in Point III below, must be interpreted in the light of the purposes of the Constitution as a whole, and particularly in

the light of the constitutional *right* to a private education, and the constitutional *right* of a state to provide for secular education as a public welfare, public purpose, responsibility.

The need for public support of some elements of private school education is widely recognized. The United States Commissioner of Education, in his above-mentioned address to the Association, after stating that "your experience and your perspective can be particularly valuable to the States", went on to say:

> "We will see more, rather than less, Federal aid to education in the years ahead for two reasons: First, the Congress knows that State and local funds alone cannot buy the kind of education we need to prepare students for a technological society and for a world beyond our shores that is infinitely more complex today than it was two decades ago. Second, a genuinely democratic society cannot tolerate the inequable distribution of quality that characterizes our State education system." THE INDEPENDENT SCHOOL BULLETIN, May, 1967, at 17.

And the Congress which, as the Commissioner points out, "is in some ways becoming our national school board," *ibid.*, has enacted legislation providing a broad range of benefits to all schools, specifically including private schools, as being in the nation's interest. See, *e.g.*, Elementary and Secondary Education Act of 1965, 79 Stat. 29, 20 U.S.C. §§236-44.

Theodore R. Sizer, Dean of the Harvard Graduate School of Education, addressing the Teacher Training section of the Association on the same date, said:

> "How to finance this necessary and responsible increased cost? In my judgment the average independent school will not be able to increase its income the requisite amount and still hold tuition down low

enough to provide for a varied student body. The only recourse is public funds, and I am prepared to argue that support of private education is in the public interest. Public education needs competition, the pace setting and goading which strong independent schools might provide." THE INDEPENDENT SCHOOL BULLETIN, *supra*, 19, 21.

The New York textbook law was enacted by a vote in the Assembly of 116 to 27, and in the Senate by 50 to 7, thus providing ratios of 4 to 1 and 7 to 1.* It was signed by the Governor. At least six other states have passed legislation in various forms providing textbooks for private school pupils.** Any constitutional inhibition relied upon to nullify social needs and purposes so urgently, authoritatively, and widely expressed, must be found in a form permitting no other interpretation, and only after all efforts have been made to accommodate all of the purposes expressed within the four corners of the Constitution.

---

* Certificates of Clerk, New York State Assembly and Secretary, New York State Senate, March 25, 19, 1968.

** Burns Indiana Stat. Ann. 1933, §28-512 (1948); Kansas Stat. Ann. §72-4107 (1964); La. Rev. Stat. Tit. 17, §351 (1963); Miss. Code Ann. 1942, Tit. 24, §6656 (1952); General Laws of Rhode Island, 1956, §16-23-2 (Supp. 1965); W. Va. Code Ann. §18-5-21b (1966).

POINT III

The First Amendment does not forbid aid to education for a secular purpose where the primary effect is neither to advance nor to inhibit religion.

In *Everson* the Court held that New Jersey busing of private school children did not violate the First Amendment on the grounds that:

> "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 18.

Application by this Court of the same criteria to the New York textbook law will establish the constitutionality of that law also. For certainly it can be said as to the New York law too:

> "The State contributes no money to the schools. It does not support them. Its legislation, as applied does no more than provide a general program to help parents * * *" *obtain secular textbooks for their children, regardless of their religion, for use in schools which comply with the compulsory education law.*

Those espousing appellants' cause and seeking to narrow down the *Everson* formula to a point where they can nullify the New York textbook law, apparently urge that any child benefit furnished within a church related school must be wholly divorced from education (dental care and milk); while that provided away from such a school's premises (busing) may include some educational benefit, *i.e.*, transportation to the classroom. One may ask whether there may not be "danger" from a saying of grace before

milk, or a prayer of thanks after dentistry. More importantly, one may ask how appellants' rules would apply to a state's furnishing of funds to educational television stations when such funds are used by the station to broadcast, by closed circuit or otherwise, class work to public and/or private schools. Is the benefit deemed rendered to the child at the television station, or to the child in the school? If the state elects to prepare motion picture films for instruction purposes, can it permit their use in private schools without charge? If the state elects to provide funds for improving the teaching capacity of teachers, can the private school teacher be a beneficiary of such a course, or is there fear that that benefit might get into the school? If the state elects to sponsor science clubs among students, under the supervision of the teachers in whatever school a child may attend, are the state and nation to be deprived of the benfits which would flow from inclusion in such science clubs of the 20% of New York children who attend private schools? Can a state lend musical instruments to all children, or does the Establishment Clause prohibit aid to music in private schools?

Unless this Court establishes constitutional guide lines which will permit a resolution of such questions, legislation which is in the interest of the broadest public welfare, both that enacted and that which would otherwise be enacted, may be thwarted in the critical years ahead.

We find nothing in *Everson* which justifies this mechanical and artificial "in school-outside school" formula which appellants would attribute to this Court. On the contrary, the Court in *Everson* recognized that the aid approved would result in an incidental benefit to schools having a concomitant religious purpose; but the statute was upheld in circumstances where the objective and pri-

mary effect were clearly secular. The test was later succinctly and definitively stated in *Schempp* where the Court said:

> "That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 374 U.S. at 222.

Application of these criteria to the New York textbook law is not difficult. The law was enacted by overwhelming vote of the legislature, to provide textbooks for 4,100,000 children in the State of New York. It was enacted in response to the above-stated finding of the legislature "that the public welfare and safety require that the state and local communities give assistance to educational programs" —not just 80% of educational programs. This finding reflects the same need for state aid to education which has been found to exist by the Congress, other states, and educational authorities all as referred to under Point II above. On this record, no hint exists that the New York statute had other than a secular legislative purpose. The first criterion of *Schempp* is thus clearly met.

It is equally clear that the "primary effect" criterion of *Schempp* is as fully met. The brief of the American Jewish Committee and others, as *amici*, rightly states that "purpose and effect are inextricably bound together." (p. 33). Thus it must be presumed that the Legislature would not enact a statute designed to achieve a specific purpose without being satisfied that the primary effect of the enactment would in fact be to achieve that purpose.

The statutory purpose of furthering the education of 4,100,000 New York State children was implemented under the subject statute by requiring book selection by the pub-

lic school organization.* No surer guardian of the secular could have been chosen. The New York Court of Appeals found expressly that the statute merely made available "secular textbooks". 20 N.Y. 2d at 117, 281 N.Y.S. 2d at 805.

Thus under this statute the private school child receives a book which the legislature provided for him for the purpose of achieving the secularly sanctioned purpose of statewide improved education, and the book itself is chosen by a secular group to achieve a secular purpose. The "primary effect"—meaning first in importance, chief, or principal—can only be the furthering of that secular education which the state has a responsibility to foster.

And let it be kept perfectly clear that the Establishment Clause is not concerned with the effect of the education which a particular school may offer. It is only concerned with the primary effect of the aid provided by the state. And, if as here, that effect is clearly secular, and is in legitimate furtherance of the primary and secondary school education of the State's public school children, then it is indeed difficult to understand how, as urged by appellants, the same identical program could produce a totally different and prohibited primary effect as to the private school children. Certainly there is nothing in the record in this case to establish the existence of a mysterious force which transmutes a secular primary effect as to 80% of the State's

---

* The statute at issue here requires that the books lent to private schools be approved either for use in the public schools or "by any boards of education, trustees or other school authorities." Section 2, ¶12 of the Education Law defines school authorities as follows:

> "School authorities. The term 'school authorities' means the trustees, or board of education, or corresponding officers, whether one or more, and by whatever name known, of a city school district, or other school district however created."

Since §701 refers to "*other* school authorities," and since "school authorities" is defined to mean public officials, it is clear that books lent to private schools must be approved by public officials.

school children, into a sectarian primary effect as applied to the remaining 20%.

The New York textbook statute provides a form of aid to education which fully qualifies under the criteria established by this Court in *Everson* and *Schempp*.

POINT IV

Schempp provides the applicable rule.

The history of the Establishment Clause has been treated exhaustively by this Court's opinions. Nothing in that history, nor in the decisions arrived at in the light thereof, gives substance to the contention that the criteria of *Schempp* are contrary to the historical purposes of the Establishment Clause, to the earlier cases decided thereunder, or to the application of *Schempp* urged herein.

The American Jewish Committee, *et al.*, as *amici*, after proposing their concept of a "child benefit" theory, which, for the reasons indicated above, we regard as unrealistic, allocate pages 25 to 38 of their brief to *Schempp*. Dealing with pre-*Schempp* decisions, to show from what *Schempp* developed, they refer to six cases:

(i) *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908), allowing Indians to expend their own funds for tuition, in any school they chose, and hence not here particularly relevant.

(ii) *Everson* v. *Board of Education, supra*, allowing use of public funds to bus New Jersey private school children, and hence highly relevant here because the busing of all children would be in the same class of *Schempp*-qualifying secular state aid as is the providing of secular textbooks for all children.

(iii) *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), where it was held improper to use public

school premises for sectarian teaching of public school children. *Schempp* would not permit this either. Both the legislative purpose and the primary effect would clearly mark this as unconstitutional. Nor was there anything inconsistent between this holding and those which sanction the use of public parks by religious groups, just as other non-religious groups may use them.

(iv) *Zorach* v. *Clauson,* 343 U.S. 306 (1952), another released time case upholding a law allowing children under initial public school attendance compulsion to have released time for attendance at religious schools. This holding goes further than anything we have urged.

(v) *Engel* v. *Vitale,* 370 U.S. 421 (1962), holding unconstitutional the recitation in public school of an officially composed prayer. This would also be invalid under *Schempp* as to both purpose and effect.

(vi) *Bradfield* v. *Roberts,* 175 U.S. 291 (1899), upholding the use of Federal funds for construction of a sectarian hospital. Appellants find this legitimate because "welfare" was the purpose rather than education. We fail to see why support under the name of "welfare" would be proper, if that under the name of "education" would not. Education is welfare. But the secular legislative purpose and secular primary effect required by *Schempp* were both present in *Bradfield.*

Schempp therefore "discarded" no existing law. It merely synthesized well-established interpretations then existing. It overruled nothing. *Schempp* today provides the criteria which will permit the fifty states to continue to serve as laboratories, free to find the ways in which education, including private education, can best be furthered in an era when all our resources must be supported to produce the best and the maximum in all areas of education.

CONCLUSION

For the reasons set forth herein, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

ETHAN A. HITCHCOCK
1 Rockefeller Plaza
New York, N.Y. 10020

WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & BROOKFIELD
1 Rockefeller Plaza
New York, N.Y. 10020

I. N. P. STOKES
MAXIMILIAN W. KEMPNER
Of Counsel